proving their case. It only remained for the President to convict. Although the report and articles found in the possession of the appellant were produced at the trial and marked as exhibits, they were not "given in evidence": they were merely produced to the Court to assist the Court in reaching a proper decision as to sentence. This ground of appeal, therefore, fails.

As to sentence, the ground of appeal is that it is excessive. In the Court below the appellant stated in mitigation that he was an addict, and a fishmonger by occupation; that he felt that he could not work without opium, and that he had a wife and four children. The latter ground is, of course, entirely irrelevant and cannot afford any excuse or mitigation of an offence of this kind. In his grounds of decision the President took all these grounds into consideration and, having regard to the previous chance given to the appellant to mend his ways, imposed the sentence which he did "to try and cure the appellant". There was no expert medical evidence before the Court as to how long an abstention from the drug was necessary to cure the appellant, and the Court proceeded to sentence the appellant without its aid. I think this was a mistake: if the Court was of opinion that a term of imprisonment was called for to effect a cure, it should have had the assistance of expert medical opinion to assist it in deciding how long was required in the case of the appellant. To impose a prison sentence to effect a cure without such medical evidence can only, in my view, lead to possible injustice on an accused person. In *Teo Heo Huat v. Rex*[1] Murray-Aynsley, C.J. observed —

"This was the case of a chandu smoker. I consider that, generally speaking, severe punishment should be reserved for traffickers and others who make a living rather than for the actual smoker, who probably contracted the habit when it was quite legal. If it is possible, prison sentences should be avoided, and, if resorted to, it should be with a view to a possible cure."

I respectfully agree with these observations. The sentence imposed here is unquestionably a very heavy one, and in the circumstances I have outlined I think that it cannot be allowed to stand. I accordingly reduce it.

I confirm the conviction and allow the appeal as to sentence which is reduced to a fine of $250, in default of payment of the fine, three months' imprisonment.

Order accordingly.

Solicitors for the appellant: *W. H. Sault & Co.*

CHONG PENG v. PUBLIC PROSECUTOR.

[A. Cr. J. (Bellamy, J.) December 19, 1953]

[Malacca — Criminal Appeal No. 15 of 1953]

Dangerous Drugs Ordinance, 1952 — Possession of prepared opium — Delivery of copy of Chemist's report — Criminal Procedure Code, s. 427(1).

This was an appeal from the conviction of the appellant on a charge under section 9(2) of the Dangerous Drugs Ordinance, 1952. It appeared that there was no evidence before the trial Court to show that the copy of the Chemist's report had been delivered to the accused as required under the proviso to section 427(1) of the Criminal Procedure Code.

Held: to render the report of the Chemist admissible in evidence the prosecution must first satisfy the Court by oral evidence that the provisions of the proviso to section 427(1) of the Criminal Procedure Code had been complied with, that is to say, that a copy thereof has been delivered to the accused within the time stipulated in the proviso and until the prosecution has done this the report cannot be received in evidence.

Cases referred to:—

(1) *Goh Tong v. Public Prosecutor* (1953) M.L.J. 251.

(2) *Public Prosecutor v. Tay Tuan* (1953) M.L.J. 20.

(3) *Oh Eng Thye v. Public Prosecutor* (1954) M.L.J. 1.

CRIMINAL APPEAL.

C. S. Jayaswal for the appellant.

L. A. Massie (Federal Counsel) for the respondent.

Bellamy, J.: — At the conclusion of the arguments I allowed this appeal, and I now give my reasons for so doing.

The appellant appeals against his conviction and sentence on a charge:—

"That you on 9.9.53 at about 3.00 p.m. at Kesang Village in the District of Jasin were found to be in possession of 80 leaf packets of prepared opium and that you have thereby committed an offence under section 9(1)(b) and punishable under section 9(2) of the Dangerous Drugs Ordinance, 1952."

There are four grounds of appeal:—

(1) "That the learned President erred in law in holding that the trial of your petitioner did not commence on the 11th day of September, 1953 when the charge was explained, your petitioner 'Claimed Trial' and bail was fixed by the trial Court (see at the back of the Charge Sheet) and therefore the learned President should not have admitted the Chemist's Report Exhibit P. 3 in evidence.

(2) That there was no other evidence to prove that the 80 leaf packets Exhibit P. 1 was prepared opium and the learned President should have held that the charge was not proved against your petitioner.

(3) That the learned President misdirected himself in law as to possession which was not proved to be exclusively by your petitioner.

(4) That your petitioner is a rubber tapper, 41 years old and is a married man, and a fine of $500 is very severe in the circumstances."

The first ground is based on the proper interpretation of the expression "commencement of the trial" in the proviso to section 427(1) of the Criminal Procedure Code of the Straits Settlements. It is answered for me by the recent decision of the Federation Court of Appeal in the case of *Goh Tong v. Public Prosecutor*[1] where it was held, approving the decision of Abbott, J. in *Public Prosecutor v. Tay Tuan*[2] that the expression "commencement of the trial" in the proviso which I have just mentioned means "commencement of the contentious phase" in a trial. There can be no doubt in the present case that, if the copy of the report of the Chemist was delivered to the appellant, it was delivered not less than ten clear days of the commencement of the trial within the meaning of the said proviso. But the point was raised that there was no evidence before the Court that the copy of the report of the Chemist was so delivered. As to this the record of the proceedings shows that there was a statement by the O.C.P.D., Jasin, Mr. Axford, not on oath that the "certificate was served on Chong Peng (the appellant) on 21st September 1953 and Yap Yau on 14th April 1953", and appended to the report itself the following indorsements :—

"Certified that a copy of this report was handed to Chong Peng and Yap Yau jointly.

(Sd.) J. Axford,
16.9.53."

"Received copy of report as overleaf.
21.9.53 (Sd. in Chinese)
Chong Peng.
19.9.53 Yap Yau (In Chinese)"

"At 7.30 a.m. 21.9.53 saya sudah sampai kan pada yang di-tudoh Report 75/53. No. 1 Chong Peng, No. 2 Yap Yau masa itu terima oleh nya.

?
Kesang
POLICE STATION."

Was this sufficient or any proof of delivery of the copy of the report of the Chemist to the appellant? I am clearly of opinion that it was no such proof. Is such proof of delivery necessary? I think so. To render the report admissible in evidence the prosecution must first satisfy the Court by oral evidence that the provisions of the proviso to section 427(1) have been complied with, that is to say, that a copy thereof has been delivered to the accused within the time stipulated in the proviso, and until the prosecution has done this the report cannot be received in evidence. In the absence of such proof, the document is inadmissible; and until such proof is forthcoming it should only be marked for identification. In the present case there was no proof of such delivery of a copy of the report of the Chemist to the appellant, and it follows that, that being my view, the report of the Chemist should not have been received in evidence. Without the report, it is frankly conceded that there was no evidence before the Court to establish that the contents of the eighty leaf packets were prepared opium, and the prosecution had failed to prove the charge.

This is enough to dispose of the appeal. But on the facts disclosed in the evidence I am satisfied that the appellant is also entitled to succeed on the third ground of appeal. The facts, as to which there is no dispute, may be summarised as follows.

On the day in question, a taxi driver picked up a fare (2nd accused) at the Jasin taxi-stand and was asked to take him to Lombong. This man was empty-handed and sat at the rear. On the way he picked up another fare (the appellant). He had a package of fish wrapped in newspaper and another packet in his hands, and he also sat at the back with the first fare, and placed his packages on the floor of the taxi in front of him. On information received this taxi was stopped en route by the police. The occupants of the taxi were searched and nothing was found on them. The taxi was then searched. The two packages which the appellant was carrying were found where he had left them, but under the floor matting a package containing 80 leaf packets of prepared opium was found. The appellant and 2nd accused denied all knowledge of this package. There was no evidence establishing any nexus between either the appellant or 2nd accused and the opium. Juxtaposition indubitably had been established, but it has frequently been held by this Court that that is not enough. I have in a recent judgment called attention to these authorities (See Malacca Criminal Appeal No. 11/53 *Oh Eng Thye v. Public Prosecutor*[3]) and need not repeat my remarks here. I am satisfied that the prosecution did not make out a *prima facie* case of possession against either the appellant or the 2nd accused.

For these reasons I allowed the appeal and set aside the conviction and sentence.

As the 2nd accused had not appealed, and this case had been brought to my notice in which I found that the prosecution had not proved their case, I ordered that the conviction and sentence of the 2nd accused also be set aside, and if any part of the fine had been paid it should be refunded.

Order accordingly.

Solicitor for the appellant: *C. S. Jayaswal.*